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IN THE COURT OF APPEAL OF THE STATE OF  
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JUNIOR VALDEZ et al.,

Defendants and Appellants.

B268914

(Los Angeles County  
Super. Ct. No. KA106861)

APPEAL from judgments of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed in part, reversed in part, and remanded with directions.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant Junior Valdez.

Pamela J. Voich, under appointment by the Court of Appeal, for Defendant and Appellant Jaime Estrada.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

## **INTRODUCTION**

Junior Valdez and Jaime Arturo Estrada appeal from judgments and sentences following their convictions for three counts of residential burglary. They contend the evidence was insufficient to support either their convictions or the jury's finding that the offenses were gang related. Valdez separately contends that the gang expert impermissibly relied on testimonial hearsay, that the trial court abused its discretion in precluding him from presenting evidence to impeach the gang expert, and that there was instructional error. Finally, Valdez contends the trial court was unaware it lacked discretion to strike two of the gang enhancements. For the reasons set forth below, we affirm the convictions of both appellants and as to Valdez, remand for resentencing.

## **STATEMENT OF THE CASE**

Appellants Estrada and Valdez, along with three codefendants (Peter Abarca, Jerry Castro, and Martin Sanchez), initially were charged with four counts of residential burglary (Pen. Code, § 459),<sup>1</sup> and it was alleged

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<sup>1</sup> All further statutory citations are to the Penal Code, unless otherwise stated.

that the offenses were committed for the benefit of, at the direction of, or in association with, a criminal street gang (§ 186.22, subd. (b)(1)(B)).

In the first trial, a jury acquitted all defendants of one count of residential burglary and was unable to reach a verdict as to the remaining counts. Following a retrial of Estrada and Valdez, a jury convicted both appellants of three counts of residential burglary and found the gang allegations true.<sup>2</sup>

The trial court sentenced Estrada to 23 years, four months in state prison, and Valdez to 15 years, eight months. Appellants timely appealed.

### **STATEMENT OF THE FACTS**

#### *A. Prosecution Case-in-Chief*

According to the prosecution, appellants and their three fellow gang members committed three burglaries on July 30, 2014. During the third burglary, neighbors called the police. Appellants were arrested shortly thereafter, within blocks of the crime scene.

Mabel Rodriguez testified she lived in the City of Covina. On July 30, 2014, she left her house at 6:30 a.m. When she returned home around 6:30 p.m., she found the back door broken, her bedroom ransacked, and her personal

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<sup>2</sup> The remaining defendants were not tried with Estrada and Valdez in the retrial. But because all five men were alleged to have participated in the burglaries, we continue to refer to them collectively as defendants.

items (including electronics, jewelry and identification cards) missing.

Ashley Marquez testified she lived with her mother and brother on East Essex Street in the City of Glendora. On July 30, 2014, she left their house around 7:45 a.m. and returned at 11:15 a.m. She noticed that the front door was “ripped off” and “all of our stuff [was] on the floor.” Ashley called her mother, Elaine Lawlor, to report the burglary; Lawlor called her son, Jonathon. Ashley, Jonathon, and Lawlor all testified that jewelry was missing from the home.

Julie Davis testified she lived on Dover Street in the City of Glendora. On July 30, 2014, she left around 11:00 a.m. for lunch, and returned around 1:00 p.m. to find the police in her home. She observed her house was “trashed,” and determined that some jewelry was missing. Davis also testified that when she left for lunch, she saw no signs of any party taking place in the area. She heard no music or loud talking. Nor did she see many young people.

Keith Seavers testified he lived across the street from Davis. On July 30, at around 11:30 a.m., he was taking a walk when he saw a white Toyota Camry in the driveway of the Davis residence. Seavers observed an individual knocking on the door of the Davis house. The person then looked through the kitchen window, walked across the yard to the gate, looked around, and then got into the Toyota. Seavers took a picture of the Toyota. Four or five individuals then exited the vehicle. Seavers entered his house and told his sister-in-law, Julia Calderon, and his

mother-in-law what he had seen. When he looked through his window at the Davis house, he saw the suspects had entered it. The Toyota then backed out of the driveway and headed eastbound on Dover. Seavers continued observing the Davis house while Calderon called 9-1-1, but he did not see anyone exit the house. Asked about the neighboring streets, Seavers testified that Essex is one block south of Dover and Gladstone is two blocks south. He also testified that the neighborhood was very quiet that morning. He did not hear any music playing or see many cars in the area.

Julia Calderon testified she was visiting her mother on Dover Street on July 30, 2014. She observed four or five men, who appeared Hispanic and were wearing dark hoodies, trying to enter the Davis house. Calderon immediately called 9-1-1 to report her observations and later called 9-1-1 again about the same incident. Calderon also testified she saw no unusual activity, unusually large number of cars parked on the block, or unusual foot traffic that day.

Thomas Cory Ennis, a dispatcher for the Glendora Police Department, testified that he received the 9-1-1 call from Calderon at 11:45 a.m. Calderon told Ennis that five male Hispanics, who were wearing dark sweatshirts or clothing, were trying to break into a house across the street from her location on Dover Street. Ennis dispatched police officers to the scene.

Sandy Martinez testified she lived on Gladstone Street in Glendora. On July 30, 2014, at around noon, she saw two

men running through her backyard. Martinez, who testified she was five feet, four inches tall, said both men appeared to be taller than her. The first man wore a baseball cap and dark-colored shirt. The second wore a dark hoodie and jeans. The first person seemed to be smaller than the second, whose build was a “little thicker” than average.

Monica Ridley, a dispatcher for the Glendora Police Department, testified that on July 30, at 11:52 a.m., she received a 9-1-1 call from Martinez. Martinez reported that two males had “hopped” into her backyard, but she did not see where they went. Minutes later, Ridley received a call from Calderon. Calderon reported that four or five subjects were breaking into her neighbor’s home on Dover Street.

Glendora Police Officer Jacob Swann testified that on July 30, 2014, at approximately 11:45 a.m., he responded to a call that several suspects were running south from the scene of a possible residential burglary. When he arrived at the scene, he heard a radio broadcast that an officer had seen a subject run south from an alley on Essex, which is “three mini blocks” from Dover, and run back north into “the backyards.” Officer Swann began searching the nearby alleys when he heard noises coming from a detached garage of a house on East Gladstone, which is south of Essex. Officer Swan broadcast that he had heard “bumping around in that garage,” and waited for additional units to arrive and provide back up.

Glendora Police Detective Timothy Crawford testified he was driving nearby and responded within a few minutes

to the call of a residential burglary. When Detective Crawford arrived, other officers were setting up a containment area around Dover and Essex. After speaking with Officer Swann, Detective Crawford and other officers forcibly entered the garage. Detective Crawford noticed that a refrigerator had been moved in front of the garage door to block the door from being opened. He also noticed large cabinets on the west side of the garage. Detective Crawford began to give commands, "telling whoever was inside to come out, put their hands up and to give up." No one responded. After about 10 minutes, Detective Crawford approached the cabinets. As he did, appellant Valdez who was inside one of the cabinets, stated, "I'm coming out, I'm giving up, I'm coming out." The officers arrested him. Detective Crawford then began opening the other cabinets, and found codefendant Sanchez inside one of the cabinets. Valdez was wearing a gray T-shirt and jeans; Sanchez was wearing a black T-shirt and black jeans. Officer Swann testified he recovered a ring belonging to Ashley Marquez from Sanchez's person.

After Valdez and Sanchez were taken into custody, Detective Crawford joined a team of officers searching for the remaining burglary suspects. During the search, the detective entered the backyard of a house on East Essex where he saw two subjects crouched down, attempting to pry open a garage door with a screwdriver. The two men, codefendants Peter Abarca and Jerry Castro, were taken into custody around 12:29 p.m. When asked where he was

from, Abarca stated he was a member of the 38th Street gang and “was obviously proud of it.”

Glendora Police Officer Casey O’Gorman testified he assisted in setting up the containment area around Dover and Essex. When he arrived on the scene at around 11:48 a.m., he was informed that an officer had stopped a white Toyota Camry with paper plates that was attempting to leave the containment area. Officer O’Gorman went to assist the officer. Appellant Estrada, who was wearing a gray T-shirt and jeans, was the lone occupant. Officer O’Gorman took Estrada into custody and had the vehicle towed to the police yard. The officer then conducted a search of the car, which was registered in Valdez’s name. He found a working police scanner underneath the driver’s seat. Officer O’Gorman opined that based on his experience investigating hundreds of residential burglaries, suspects would use police scanners to determine whether police were en route to a crime scene. Inside the Camry’s trunk were jewelry, watches and identification belonging to Mabel Rodriguez.<sup>3</sup> Other items inside the trunk were identified by Elaine Lawlor and her family as belonging to them.

Eric Wendling, a community service officer for the Glendora Police Department, testified that he found a wooden jewelry box, a nylon glove, and a blue shirt in a side

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<sup>3</sup> Officer Swann testified that Rodriguez’s house was approximately one mile from the Davis house, a two- to three-minute drive away.



yard of a house on East Gladstone. When Wendling showed the box to Davis, she identified it as belonging to her. Wendling also found a black flex cap and a gray flex cap on the west side of the property. He swabbed the blue shirt, nylon glove and caps for D.N.A. testing. Sean Yoshii, a criminalist with the Los Angeles County Sheriff's Department, testified he performed D.N.A. analysis on swabs taken by Wendling. Yoshii testified that Valdez was a major contributor to the D.N.A. found on the blue shirt and black hat, and that Sanchez was a major contributor to the D.N.A. found on the glove and gray hat.

It was stipulated that the 38th Street Gang (38th St.) was a criminal street gang within the meaning of section 186.22. Several police officers testified about the defendants' affiliation with the gang. Los Angeles Police Officer Christopher Soto testified he was familiar with the gang as part of his assignment with the Newton Division of the police department. On June 3, 2013, he encountered Valdez and Abarca. Valdez self-admitted his membership in 38th St. and told the officer his moniker was "Demon." He gave his height as five feet, six inches, and his weight as 160 pounds. Abarca self-admitted his membership in the gang and stated that his moniker was "Pooky." Officer Soto also testified that in February 2014, he initiated a traffic stop of Castro. Castro self-admitted his membership in 38th St. and told the officer his moniker was "Vicious."

Los Angeles Police Officer Ruben Garcia testified he was assigned to the Newton Division from 2000 to 2009. On

May 5, 2005, Garcia encountered Estrada at Estrada's home, which is in 38th St.'s territory. Estrada was wearing a shirt with "38" on it. From prior contacts, Officer Garcia knew Estrada to be a member of 38th St. with the moniker "Lurch." On April 15, 2015, Officer Garcia encountered Valdez and Sanchez a few blocks away from Estrada's house. From prior contacts with both men, Officer Garcia knew they were members of 38th St.

Los Angeles Police Officer Luis Anchondo testified as the prosecution's expert on 38th St. Officer Anchondo testified he had daily contact with 38th St. members. Within the gang, there are cliques, such as Morgan Boys and Tiny Locos. "But they're all 38th Street." Rival gangs included all black gangs and some Hispanic gangs such as Florencia Trece. According to the officer, the 38th St. gang's territory is bordered by 33rd Street to the north, Central to the west, Vernon to the south and Alameda to the east.<sup>4</sup>

Officer Anchondo testified that gang members tend to commit crimes, such as burglaries, together because there was "[s]afety in numbers and you always have somebody that has your back." Asked why gang members would go outside gang territory to commit crimes, Officer Anchondo explained that they did so "to expand their territory, to instill fear in the rival gang members and the citizens who live within the area that they are committing their crimes

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<sup>4</sup> It is undisputed that the burglaries occurred outside 38th St. territory.

in.” He further explained that gang members might go “far outside their territory” to commit burglaries because the homes there would be “more upscale,” and local police would not recognize them as gang members. Although Officer Anchondo was not aware of 38th St. members going outside their territory to commit burglaries, he was aware of other gangs doing so and the practice becoming more common.

Officer Anchondo opined that Valdez was a 38th St. member and part of the Tiny Locos clique based on Valdez’s gang tattoos. Similarly, Estrada was a member of the gang based on his tattoos.<sup>5</sup> Officer Anchondo opined that Abarca was a member of 38th St., based on the officer’s review of Abarca’s gang tattoo, social media showing Abarca making a gang sign, and prior contacts with other officers. He opined that Castro was a 38th St. member and part of the Morgan Boys clique based on Castro’s tattoos and hand signs, as well as prior contacts with other officers. Finally, he opined that Sanchez was a 38th St. gang member based on his tattoos and prior contacts with other officers.

Asked a hypothetical whose facts mirrored the present case, Officer Anchondo opined that the burglaries in

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<sup>5</sup> On appeal, Estrada argues that Officer Anchondo “admitted that [Estrada’s] tattoos had been modified to remove any gang significance.” However, Officer Anchondo testified that a gang tattoo had been modified after Estrada was arrested in this case. Moreover, he testified that the modified tattoo still had a 38th St. gang symbol -- a clock with hands pointing to “3” and “8.”

Glendora were committed for the benefit of, at the direction of, or in association with, 38th St. He stated that the gang benefitted because the burglaries would provide the gang with “money to buy drugs which they [can] then sell, and [buy] guns for protection.” Additionally, the proceeds from the burglaries would allow gang members to be “full-time gang member[s]” and not have to hold “legitimate jobs.”

On cross-examination, Officer Anchondo testified that Barrio Mojado and Playboys are rival gangs that are enemies of 38th St. When asked about the 18th Street Gang, the officer stated that because the gang territories were geographically distant, the gang members would not meet often. “I currently don’t see any rivalry between 18th Street and 38th Street.” Officer Anchondo opined that members of Barrio Mojado and Playboys would not socialize with 38th St. members, and that they would not get together and make a video. He was aware of a video with 38th St. and 18th Street gang members. Asked about a video showing members of Barrio Mojado, Playboys, 18th Street and 38th St. partying with Los Angeles Police Department officers, Officer Anchondo stated that he could identify only members from 18th Street and 38th St. in the video.

Los Angeles County Deputy Sheriff Ricardo Lavan testified that on September 24, 2012, he responded to a suspicious person call at a residence in the City of Norwalk. When he arrived, he observed a window open, with its screen on the ground. When the deputy entered the backyard, he saw Estrada come out of the house. Deputy Lavan ordered

Estrada to stop, but he fled. After a chase, Estrada and another man, Gerardo Valencia, were detained. Officer Anchondo opined that Valencia was a 38th St. gang member, based on field information reports and conversations with other officers.

B. *Defense Case*

Valdez testified in his own defense. He admitted being a member of 38th St., part of the Tiny Locos clique and having the moniker “Baby Demon,” but claimed to have become inactive in 2009 or 2010. Having known all of the codefendants for many years, Valdez stated that Estrada and Sanchez were not members of 38th St., while Abarca and Castro were. Both Estrada and Abarca were related to Valdez; they were cousins of the mother of his son. Valdez testified he knew Valencia, but asserted that Valencia was a member of the Grape Street Watts gang, not 38th St.

Shown a still photo from a music video, Valdez identified Abarca, Castro and three other males as members of 38th St. He did not identify any others shown in the photo as members of any other gang.

Valdez admitted having been convicted of grand theft auto in 2009 and of selling crystal meth in 2012. He denied the crimes were committed for the benefit of 38th St., claiming to have kept all the proceeds for himself.

Valdez testified that July 30, 2014 was the first time he had ever been in Glendora. He had heard from his friend Teresa Vargas that a young woman was skipping school and hosting a “kickback” at her house in Glendora. A “kickback”

is small indoor gathering, not a “full-blown party.” At around 8:30 a.m. that morning, Teresa picked him up in her car and drove to Glendora. They arrived at the house where the kickback was occurring at around 9:00 a.m. Valdez could not recall the exterior of the house. Asked to provide an approximate location, Valdez identified several houses around the 1100 block of East Essex, very close to the Davis house. Teresa introduced Valdez to the hostess -- Amy, a short white woman with blonde hair. Valdez began drinking vodka and “making out” with a female.

About an hour and a half after he arrived, Valdez received a call from Estrada. Estrada asked if Valdez could pick him up and take him to the kickback. Valdez stated he was busy, but told Estrada he could borrow Valdez’s white Toyota Camry, which was parked at Valdez’s house in South Central Los Angeles. About an hour later, the loud music that had been playing stopped suddenly, and Valdez heard someone say, “Oh, cops, cops.” Although Valdez was not on parole or probation, he decided to leave because drugs were being used in the house. He exited by the side door because the police were in the front of the house.

As Valdez was leaving, Teresa met him and gave him a small amount of marijuana that she had for personal use. He crossed the alley and hid in a nearby backyard. He was stashing the marijuana near a trashcan when a white female homeowner came out and began yelling at him. Valdez then hopped over the fence of two properties. He took off his blue shirt and black hat and hid them behind a trashcan because

he was afraid the female homeowner would identify him from his clothing. As Valdez was hiding his clothing, Sanchez jumped over the fence into the same backyard. Valdez was not surprised to see Sanchez because although he had not seen him at the kickback, Sanchez had said he was going to show up. Valdez did not see any jewelry box or screwdriver, and was unaware that Sanchez was in possession of a stolen ring. Valdez saw that the garage was open, so the two men entered it and hid in the cabinets. Asked to explain why he did not heed the police commands to come out of the cabinet, Valdez explained, "I wasn't sure if they were talking to us or if they were talking to somebody else around there."

Valdez could not explain how his white Toyota Camry came to be photographed outside the Davis house. He had no explanation for the police scanner found in the vehicle. Asked why the vehicle had paper plates, Valdez explained that he did not have metal plates because he did not have enough money to pay for the "full registration" process.

On cross-examination, Valdez admitted having committed crimes with other 38th St. members in 2007 and 2009. As to the latter -- a conviction for selling parts to a "chop shop" -- Estrada also was charged. Valdez could not explain why his Toyota had stolen property in the trunk when Estrada was driving it on July 30. Asked again to provide a location for the "kickback," Valdez stated that it was one of the houses located near 1122 Essex.

Teresa Vargas, whom Valdez identified as the person who drove him to the kickback and who according to Valdez, was “here in court yesterday,” was not called to testify. Estrada did not testify.

C. *Rebuttal Case*

Officer Crawford testified that he searched the entire neighborhood around the Davis house, including the locations suggested by Valdez, but could identify no house in which any “kickback” occurred. The officer spoke with residents in 61 out of 69 houses in the neighborhood, but no resident resembled Amy, the alleged hostess.

Officer Crawford testified that six cellular phones were recovered from the defendants: Estrada and Abarca each had two phones; Castro and Sanchez each had one phone. Although no phone was recovered from Valdez, the police were able to determine that a cellular phone number had been registered to him. Glendora Police Detective Matt Fenner testified he downloaded and examined the contents of five of the six phones; he was unable to access one of Estrada’s phones. He searched the contents for “Glendora” and “kickback,” but found no results.

The phone records showed multiple contacts between the defendants the night before the burglaries: on July 29, 2014, at 8:00 p.m., a call between Estrada and Abarca; at 8:26 p.m., a call between Sanchez and Estrada; at 9:47 p.m., a call between Sanchez and Abarca; and at 9:56 p.m., a call between Castro and Abarca. At 10:24 p.m., Estrada texted Sanchez, “Aye, Loc, tell Jesse to stay home tomorrow. Ima



go.” At 10:57 p.m., Castro texted Abarca, and at 11:02 p.m., Castro called Valdez.

There were multiple contacts between the defendants on the day of the burglaries: Sanchez called Abarca at 12:07 a.m.; Abarca called Sanchez at 3:52 a.m.; and Sanchez called Abarca at 6:55 a.m. After Sanchez called Abarca, Valdez texted Abarca at 7:10 a.m. During the morning of July 30, 2014, Sanchez called Estrada multiple times: at 9:46 a.m.; 10:14 a.m.; 11:00 a.m.; 11:32 a.m.; and 11:43 a.m. At 11:55 a.m., Sanchez texted a party named “BBY” that “Aye, we got caught up.” At 12:03 p.m., Abarca texted Valdez, “Aye.” He sent the same text message to Estrada at 12:04 p.m. At 12:14 p.m., Abarca texted “ALE” that he was “hiding from cops.”

Estrada did not text Valdez that day, and Valdez’s phone number was not listed as a contact on Estrada’s phone.

## **DISCUSSION**

### *A. The Burglary Convictions.*

Valdez and Estrada contend there was insufficient evidence to support their burglary convictions. We disagree.

#### *1. Valdez*

The prosecutor argued that Valdez was liable either as a direct perpetrator of the three burglaries, a conspirator in an uncharged conspiracy to commit those burglaries, or an aider and abettor of the burglaries. The jury was instructed on all three theories of liability. Valdez notes that no eyewitness identified him as a perpetrator, that his

fingerprints and D.N.A. were not found at the scene, and that he was not found in possession of any stolen items or burglary tools. Nevertheless, we conclude that substantial evidence in the record supports the jury's verdicts.<sup>6</sup>

The evidence was sufficient for a jury to find that Valdez committed burglary of Davis's house. Seavers testified that four or five men broke into the Davis house, but did not exit through the front door. At 11:45 a.m., his sister-in-law, Calderon, called 9-1-1 to report four or five Hispanic males in dark-colored clothing were breaking into the Davis house. Minutes later, at 11:52 a.m., Martinez called 9-1-1 to report two males had run through her backyard, which is two blocks away from the Davis house. Martinez described one of the males as wearing a baseball cap and dark-colored shirt. A black hat and blue shirt found

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<sup>6</sup> In determining whether the evidence is sufficient to support a conviction, "the reviewing court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.) "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] . . . Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

in a nearby yard contained Valdez's D.N.A. Valdez admitted the blue shirt was his. The shirt was next to a wooden jewelry box, which Davis identified as hers. Martinez also described the male wearing the cap as being taller than five feet, four inches, and of average build. Valdez testified to being five feet, six inches, and weighing 160 pounds the previous year. Additionally, Valdez admitted having entered the backyard of a female homeowner.

At around 12:05 p.m., Valdez and Sanchez were found hiding inside cabinets in the garage of another house, on the same street as Martinez's. One or both men had tried to barricade the garage by moving a refrigerator to block the door. Neither responded to police commands to surrender. Sanchez's D.N.A. was found on a gray hat next to the black hat containing Valdez's D.N.A., and on a glove found next to Valdez's blue shirt and Davis's jewelry box.

From this evidence, it is reasonable to infer that Valdez and Sanchez were two of the four or five Hispanic men who broke into Davis's house. The men left the Davis house through the back and jumped fences into several backyards. When they became aware the police had been called, they abandoned their clothing and contraband in the backyard of a house, and then hid inside the garage of another house. In short, substantial evidence supported Valdez's conviction for the residential burglary of Davis.

As to the residential burglaries of Rodriguez and Marquez, the evidence showed that Valdez was either a perpetrator, a coconspirator or an aider and abettor.

Because the burglaries all occurred the same morning, it could be inferred that the same modus operandi was used, i.e., the men cased houses to ensure they were vacant, then broke in and stole jewelry and other valuable portable personal property. Officer Swann testified it would take only two or three minutes to drive between the Davis house and the farther of the two other houses. Seavers saw the suspects exit from a white Toyota, which was registered to Valdez. When the vehicle was impounded and searched the day of the burglaries, it contained a police scanner -- often used by burglars -- and items stolen from the Rodriguez and Marquez houses. When Valdez was arrested with Sanchez, Sanchez had a ring stolen from the Marquez house. From this evidence, a jury could reasonably infer that Valdez was a perpetrator.

The evidence also showed that Valdez could be found guilty as a coconspirator or an aider and abettor. Valdez admitted being a long-time acquaintance of Sanchez, Abarca, Estrada and Castro; he was related to Abarca and Estrada through the mother of his son. He also admitted having previously committed crimes with Estrada and other 38th St. members. Estrada was arrested driving Valdez's car, which contained property stolen from the Rodriguez and Marquez homes. Fellow 38th St. gang members, Abarca and Castro, were arrested trying to break into a locked garage. The phone calls between the men supported an inference that they planned the burglaries. There were multiple phone contacts between the five men on the evening of July

29 and throughout the day on July 30, including contacts between Valdez, Castro, and Abarca. This same evidence supported the inference that Valdez aided and abetted the burglaries by providing the getaway vehicle after learning that the men planned to commit the burglaries. On this record, a jury could reasonably find that Valdez was guilty of the other residential burglaries.

## 2. *Estrada*

Substantial evidence also supported Estrada's convictions. During closing arguments, the prosecutor asserted that Estrada was liable as "an aider and abettor for being the get-away driver and the transporter of the stolen merchandise" and as a coconspirator. With respect to the Davis burglary, the evidence showed Estrada was arrested around 11:48 a.m., driving the white Toyota that Seavers had observed and photographed at the Davis house minutes earlier. Valdez, the registered owner of the Toyota, admitted lending the car to Estrada that day. Seavers testified to seeing an individual exit the white Toyota and act in a manner consistent with casing the house to commit a burglary, i.e., knocking on the door to determine whether anyone was inside and looking over the property. The individual returned to the car before four or five men exited the vehicle. The men entered the house before the white Toyota drove away. The evidence also showed that the burglars fled the Davis house through alleys and backyards, suggesting that they sought to avoid detection. Although Estrada drove away from the Davis house, he remained

nearby, available to pick up the men and transport them and their contraband away from the scene. The multiple calls between Estrada and Sanchez also suggest that Estrada was being updated about the progress of the burglary and the men's location. Finally, as Officer Lavan testified, Estrada already had participated in breaking and entering into a house in Norwalk with a gang member. From this evidence, a jury could reasonably infer that as the driver, Estrada was aware that the men intended to commit a burglary at the Davis house, and that he had agreed to assist them by driving to the scene and acting as the getaway driver and transporter of the stolen property. In short, substantial evidence supported Estrada's conviction for the Davis burglary.

The evidence also supported Estrada's convictions for the Rodriguez and Marquez burglaries. Estrada was arrested minutes after driving away from a scene of a burglary. Items stolen during the other two burglaries, which occurred earlier that morning, were found in the vehicle he was driving. Additionally, Estrada was in contact with Sanchez -- who was in possession of a ring stolen from the Marquez house -- throughout the period when the Marquez and Rodriguez burglaries occurred. Finally, as noted above, the numerous phone calls and text messages between the parties suggest that defendants conspired to commit the burglaries. In light of the events on July 30, Estrada's text message to Sanchez the previous night that "Jesse" could stay home and "Ima go" suggests he was part of

a conspiracy to commit the burglaries or that he agreed to aid and abet them. In sum, substantial evidence supported Estrada's burglary convictions.

B. *The Gang Allegations*

1. *Expert Testimony about Defendants' Gang Membership*

Citing *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), which was decided after the jury reached its verdicts, Valdez contends he was denied his confrontation rights because Officer Anchondo improperly relied on testimonial hearsay to opine that the five defendants were 38th St. members. In *Sanchez*, our Supreme Court held that a defendant's confrontation rights are violated where a gang expert relies on field identification cards filled out by other officers or those officers' prior contacts with a defendant to opine about case-specific facts, such as a defendant's membership in a specific gang or his intent to benefit that gang. (*Id.* at pp. 697-699.) The court noted that although the existence of a tattoo would need to be established by a testifying witness or an authenticated photograph, a gang expert may testify, without violating the defendant's confrontation rights, that a specific tattoo is a "gang tattoo" and that possession of such a tattoo indicates the defendant's membership in a specific gang. (*Id.* at p. 696.) Here, although Officer Anchondo's testimony relied in part on testimonial hearsay, he also based his opinion on the defendants' gang tattoos, as shown in photos admitted in evidence without objection. In any event, any *Sanchez* error

was harmless beyond a reasonable doubt. Officer Soto testified that based on his personal contacts with the defendants, Valdez, Abarca, and Castro were self-admitted members of 38th St. Likewise, Officer Garcia testified that based on his personal contacts with the defendants, Valdez, Estrada, and Sanchez were self-admitted members of the gang. Finally, Valdez admitted he was a 38th St. member, and testified that Abarca and Castro were active members. In short, admission of any portion of Officer Anchondo's expert testimony about the defendants' membership in 38th St. based on testimonial hearsay was cumulative and harmless beyond a reasonable doubt.

2. *Excluding a Video to Impeach Gang Expert*

Valdez contends the trial court erred in excluding a four-minute, 15-second video that would have impeached the prosecution's gang expert witness and bolstered his claim that he was an inactive member of 38th St.

a. *Relevant Background*

During the cross-examination of Officer Anchondo, the officer testified that rival gang members, such as those from 38th St. and Barrio Mojado or Playboys, did not socialize. He also testified that he was unaware of a rivalry between 38th St. and the 18th Street Gang because the two gangs were geographically distant. Asked about a music video purportedly showing members from 38th St., 18th Street, Barrio Mojado and Playboys together, Officer Anchondo testified he could identify only members from 38th St. and 18th Street in the video.



After the cross-examination of Officer Anchondo concluded, Estrada's trial counsel stated he planned to "play the video" and have "an expert . . . identify all the gangs [shown in] there" to impeach Officer Anchondo's testimony that rival gang members "do not party together and they don't do things together and . . . that they hate each other so much that they would not corroborate [*sic*] on . . . a video like that." The trial court determined, under Evidence Code section 352, that playing the entire video would be an undue consumption of time and found the video's impeachment value was minimal. It stated that the officer had acknowledged identifying two different gangs in the video, but "[n]o one asked any follow-up questions in terms of what the significance of that was." "So to now go and have someone come in and start identifying other gangs in there, it has no relevance because all it is doing is it doesn't give the circumstance under which . . . they wound up together." The court further noted that the issue was "collateral" to the gang expert's opinion as to "the status of these individuals and whether they committed this crime for the benefit of 38th Street."

Valdez's trial counsel then stated that Valdez, rather than an expert, would identify the gang members in the video. The court stated, "Okay. Very good. Then why are we having this conversation?" Counsel responded that the defense wanted to be able to play the video. The court replied, "Well, we're not going to play the video. He [Valdez] can just simply say that he's aware of the video, and he can

say it.” Later, the court stated: “Mr. Valdez, if he wishes to testify to that, can be cross-examined in terms of the current status of Florencia, Playboys, or whoever else was identified in that video in terms of 38th Street and . . . whether they are living peaceably alongside each other or they . . . have a rivalry that existed before and continues to exist after that video.”

Valdez’s trial counsel stated that the video would undermine Officer Anchondo’s testimony that Valdez was an active gang member. “Mr. Valdez is going to say . . . that he’s inactive, and that particular video would show that he’s inactive because he’s essentially associating with members of rival gangs and active members wouldn’t do that.” Asked whether Valdez would testify that Florencia and Playboys were rivals of 38th St. before and after the video, counsel represented that Valdez would testify that the gangs remained rivals. The court stated: “Okay. So how does that impeach the officer with one unique event there in the video?” Counsel responded that “it goes to show whether or not the officer’s -- his veracity for truthfulness as to his knowledge of gangs . . . .” Noting that counsel never questioned Officer Anchondo concerning the circumstances under which the video was made, the court stated, “[Y]ou can’t use it to impeach if he didn’t get the opportunity to explain it. . . . The video is off the table for -- there’s no impeachment value to it.”

Subsequently, during Valdez’s direct examination, he was shown a still photo from the music video. Valdez

identified the persons shown in the image as Abarca, Castro, and three other 38th St. members named Armando, Alex, and Mario. He did not identify any other person as belonging to a rival gang.

b. *Discussion*

We find no abuse of discretion under Evidence Code section 352 with the trial court's decision to preclude the playing of the entire video. The video was marginally relevant only to the extent it showed members of rival gangs socializing. The trial court permitted Valdez to identify all gang members shown in the video, but he identified only members of 38th St. in a photo taken from the video. Thus, Valdez failed to establish the relevancy of the video. Moreover, as the court properly found, the impeachment value of the video itself was minimal. Whether rival gang members made a video together would not undermine Officer Anchondo's testimony concerning the defendants' membership in 38th St. or whether the burglaries were gang related.

3. *Jury Instruction on Gang Enhancement*

The trial court instructed the jury with CALCRIM No. 1401 that in order to prove the gang enhancement allegation, the People must prove that: "Defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang." Valdez contends the court erred in failing to give a sua sponte instruction clarifying the meaning of the phrase "in association with a criminal street gang." Assuming, arguendo, that this claim

has not been forfeited (see *People v. Russell* (2010) 50 Cal.4th 1228, 1273 [failure to request a clarifying instruction results in forfeiture of claim of instructional error]), we conclude the trial court had no duty to give a clarifying instruction sua sponte.

Valdez contends that *People v. Albillar* (2010) 51 Cal.4th 47 (*Albillar*) clarified the phrase “in association with a criminal street gang.” However, neither the majority nor the dissent in *Albillar* defined the meaning of that phrase. There, in determining the existence of substantial evidence to support the section 186.22 gang enhancement, the majority concluded that the fact that the three defendants “relied on their common gang membership and the apparatus of the gang” to commit the offenses satisfied the “in association with a criminal street gang” element. (*Id.* at p. 60.) The majority did not hold that those factual circumstances were the only circumstances that would satisfy the element. In her partially dissenting opinion, Justice Werdegarr criticized the majority’s “definition” of “in association with” as a misplaced focus on gang members who associate with one another, rather than associating with the gang. (*Id.* at p. 73 (conc. & dis. opn. of Werdegarr, J.).) Justice Werdegarr did not advocate a specific definition of “in association with.” Rather, she cited to a common definition of “associate,” namely, the definition from the “Merriam-Webster’s Eleventh Collegiate Dictionary (2004).” (*Id.* at p. 70, fn. 2 (conc. & dis. opn. of Werdegarr, J.).) However, “[a] trial court has no sua sponte duty to give amplifying or

clarifying instructions . . . where the terms used in the instructions given are ‘commonly understood by those familiar with the English language.’ [Citation.]” [Citation.]” (*People v. Ellis* (1999) 69 Cal.App.4th 1334, 1338.) Thus, we reject Valdez’s claim that the trial court had a duty to give, sua sponte, a clarifying instruction on the phrase “in association with a criminal street gang.”

4. *Sufficiency of the Evidence as to the Gang Enhancements*

Appellants contend there was insufficient evidence to support the gang enhancements. We disagree.

Section 186.22, subdivision (b)(1) provides a sentencing enhancement for felonies “committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” Thus, the prosecution must prove that the underlying felony was “gang related” and that the gang-related offense was committed ““with the specific intent to promote, further, or assist in any criminal conduct by gang members.”” (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484.) An expert can properly “express an opinion, based on hypothetical questions that track[] the evidence, whether the [crime], if the jury found it in fact occurred, would have been for a gang purpose. ‘Expert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1),

gang enhancement. [Citation.]” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

To prove the crime was “gang related,” the prosecution need only prove one of three alternatives: the crime was committed “(1) for the benefit of, (2) at the direction of, or (3) in association with a gang.” (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198, italics omitted.) With respect to the “in association with a criminal street gang” element, in *Albillar* our Supreme Court held that this element may be satisfied by substantial evidence that two or more defendants “came together *as gang members*” to commit the felony. (*Albillar, supra*, 51 Cal.4th at p. 62.) There, the evidence established that each defendant was a member of the same gang, that they actively assisted each other in committing the crimes, and that “their common gang membership ensured that they could rely on each other’s cooperation in committing these crimes and that they would benefit from committing them together.” (*Ibid.*; see also *People v. Morales, supra*, at p. 1198 [“the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members”].) Here, Valdez and Estrada had committed crimes with other gang members on prior occasions. Officer Anchondo testified that when 38th St. gang members commit crimes, such as burglaries, together, they benefit because of “safety in numbers and you always have somebody that has your back.” As discussed, the evidence showed that all defendants were members of 38th

St. and knew one another. Each defendant participated, either as a perpetrator or an aider and abettor, in committing the burglaries. In short, substantial evidence supported the jury's finding that the crimes were gang related because appellants and their co-defendants came together as gang members to commit the burglaries.<sup>7</sup>

As to the second prong of the gang enhancement, "if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Albillar, supra*, 51

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<sup>7</sup> Appellants' reliance on *People v. Franklin* (2016) 248 Cal.App.4th 938 is misplaced. There, the appellate court found "no showing that appellant [a member of the Jim Town gang] committed his crimes in association with other members of the Jim Town gang" because "the prosecution sought to prove the offenses were 'in association with' members of a criminal street gang with evidence that appellant falsely imprisoned [the victim] with the assistance of three friends who were members of other gangs, not the Jim Town gang." (*Id.* at p. 950.) In contrast, here, the prosecution presented evidence that all five defendants who allegedly participated in the burglaries were members of the same gang.

Likewise, *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*) does not assist appellants. *Ramon* was decided before *Albillar*, and it did not address the "in association with" element of the gang enhancement. (See *Ramon*, at pp. 849-853.)

Cal.4th at p. 68; accord, *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 [“Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime”].) As discussed, the evidence showed appellants participated in the burglaries with known members of the same gang. Thus, the jury may reasonably infer the requisite specific intent. In sum, substantial evidence supported the jury’s true finding on the gang enhancements.

C. *Cumulative Error*

Valdez contends there was cumulative error. Aside from *Sanchez* error, which was harmless beyond a reasonable doubt, we have found no other error. Accordingly, we reject this claim.

D. *Sentencing of Valdez*

Valdez contends the trial court erred in imposing terms for all three gang enhancements. Alternatively, he argues his case should be remanded for resentencing because the trial court was unaware it had discretion to strike the gang enhancements.

At the sentencing hearing, the trial court stated it was inclined to stay two of the gang enhancements (on counts 2 and 3) because “the People’s own theory . . . was a conspiracy that took place between these gang members in South Central Los Angeles where their intent was to go out in[to] the suburbs, that being Glendora, to commit residential



burglaries.” The court noted the burglaries seemed to be committed according to the same “pattern,” and “[t]here seemed to be a common plan, a common purpose.” The prosecution argued that “even taking defendant’s argument that the crimes constituted a continuous course of conduct . . . the two gang enhancements were proper because there were two independent victims and two distinct [burglaries].” Valdez’s counsel argued that even if the prosecution were correct, “the court has discretionary authority” and “I would ask the court to exercise [its] discretion not to impose the gang allegation consecutive as to each residential burglary.” After determining that “15 years, 8 months as to this defendant is a sufficient punishment for the crimes of which he is being sentenced,” the court stated that it thought the prosecutor was correct that counts 2 and 3 were subject to a section 186.22, subdivision (b)(1)(B) enhancement, but “the court will impose and stay the sentences on those.” The court then reviewed Valdez’s extensive criminal history and heard from his family members before pronouncing sentence. It imposed the upper term of six years as to count 1, with a consecutive five-year gang enhancement and two one-year prison prior enhancements and, as to counts 2 and 3, one-third the middle term (one year, four months each), with two five-year gang enhancements, to run concurrently, for a total of 15 years, eight months in state prison.

We conclude the trial court’s sentence was unauthorized. Section 186.22, subdivision (b)(1) provides for

the mandatory imposition of consecutive terms on the enhancement. It states in relevant part that “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, *shall*, upon conviction of that felony, *in addition and consecutive to the punishment prescribed . . . be punished as follows . . .*” (Italics added.) Thus, where the substantive offense is not stayed pursuant to section 654, “the trial court [does] not have the authority to stay [the] gang enhancement.” (*People v. Vega* (2013) 214 Cal.App.4th 1387, 1396.) Instead, the trial court must either impose consecutive terms on the gang enhancements or strike the enhancements pursuant to section 186.22, subdivision (g). (*Id.* at p. 1397.)<sup>8</sup> Because the sentences on counts 2 and 3 were not stayed, the trial court lacked authority either to stay the gang enhancements or to impose concurrent terms on the enhancements. However, in light of the trial court’s comments concerning the appropriateness of the sentence imposed, we cannot say how

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<sup>8</sup> Subdivision (g) of section 186.22 provides: “Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section . . . in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.”

the court might have exercised its discretion under section 186.22, subdivision (g). Accordingly, we remand the matter to the court to permit it to exercise its discretion, if it chooses, to strike Valdez's two gang enhancements.

### **DISPOSITION**

The judgments of convictions are affirmed, and Estrada's sentence is affirmed. Valdez's sentence is reversed, and the matter remanded for the trial court to decide whether to strike the gang enhancements as to counts 2 and 3 pursuant to section 186.22 subdivision (g).

**NOT TO BE PUBLISHED IN THE OFFICIAL  
REPORTS.**

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.